IN THE SUPREME COURT OF MISSOURI

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| L.A.C., A MINOR, BY AND THROUGH HER NEXT FRIEND, DINA CANNON,<br><br>Appellant,<br><br>v.<br><br>WARD PARKWAY SHOPPING CENTER COMPANY, L.P., WSC ASSOCIATES, L.P., IPC INTERNATIONAL CORPORATION, and G.G. MANAGEMENT CO., INC.,<br><br>Respondents. | ) | No. SC83718 |

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**SUBSTITUTE BRIEF OF RESPONDENT**
**IPC INTERNATIONAL CORPORATION**

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**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,**
**THE HONORABLE PRESTON DEAN**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

## JURISDICTIONAL STATEMENT

On January 16, 1998, Plaintiff/Appellant L.A.C. (a minor, by and through her next friend, Dina Cannon) filed a petition in the Circuit Court of Jackson County alleging that she had been assaulted in a shopping mall. Legal File ("L.F.") at 13. In her third amended petition, the plaintiff asserted claims against the owners of the mall, its management company, and the shopping center's security contractor. On November 22, 1999, the trial court entered a final judgment in favor of the defendants on all claims. L.F. at 1749.

On December 22, 1999, the plaintiff filed a motion for new trial. L.F. at 1761. The motion was denied on January 6, 2000. L.F. at 1773. On January 13, 2000, the plaintiff filed a timely notice of appeal to the Missouri Court of Appeals, Western District. § 512.020, RSMo.

Jurisdiction was proper in the court of appeals pursuant to Article V, Section 3, of the Missouri Constitution because this case does not involve the validity of a treaty or statute of the United States or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or the imposition of the death penalty. The Circuit Court of Jackson County is within the territorial jurisdiction of the Missouri Court of Appeals, Western District. §§ 477.050-.070, RSMo.

On April 17, 2001, a panel of the Missouri Court of Appeals, Western District, rendered an opinion reversing the judgment of the trial court. On May 2, 2001, within fifteen days of the opinion, the respondents filed timely motions for rehearing and applications for transfer in the court of appeals. On May 29, 2001, the court of appeals denied the motions for rehearing and alternative applications for transfer.

On June 13, 2001, within fifteen days of the denial of the motions for rehearing and alternative applications for transfer in the court of appeals, the respondents filed timely applications for transfer in this Court. On August 21, 2001, this Court sustained the applications for transfer. This Court has jurisdiction to entertain appeals on transfer from the court of appeals pursuant to Article V, Section III, of the Missouri Constitution.

## STATEMENT OF FACTS

The Ward Parkway Shopping Center is a shopping mall located in Kansas City, Missouri. The respondents are the owners of the mall, its management company, and the shopping center's security contractor. L.F. at 14. Defendant/Respondent IPC International Corporation provides security services at the mall under contract with G.G. Management Co., Inc. L.F. at 1587. Ward Parkway Shopping Center Company, L.P., and W.S.C. Associates, L.P., contract with G.G. Management to manage the mall. L.F. at 1689.

IPC employs unarmed security officers and off-duty police officers to patrol both inside and outside the mall (with the exception of the tenant space and AMC Theaters, the latter being patrolled by AMC's own security). L.F. at 340. IPC provides security services to shopping centers at approximately 185 locations. L.F. at 744.

**The plaintiff and Brandon Fitzpatrick.**

The plaintiff met Brandon Fitzpatrick at the mall on March 8, 1997, one week prior to the date on which she alleges he raped her. L.F. at 485, 486. The plaintiff's friend A.G. was also present when the couple first met. L.F. at 486. Fitzpatrick introduced himself to the two girls at the food court inside the mall's lower level and, after talking for a while, exchanged phone numbers with the plaintiff. L.F. at 486. After their initial meeting at the shopping center, the

plaintiff told her friends that Fitzpatrick was her boyfriend. L.F. at 839. The plaintiff and Fitzpatrick talked on the phone at least two times during the following week and Fitzpatrick told the plaintiff that he was in a gang. L.F. at 486-87.

**The events of March 15, 1997.**

Fitzpatrick called the plaintiff again on March 15, 1997, to ask whether she would be going to the mall that night. L.F. at 487. The plaintiff told him she was going to see a movie there, and Fitzpatrick told her he might see her at the mall. L.F. at 483. That night, the plaintiff's mother dropped off the plaintiff and A.G. at the mall at around 7:00 or 8:00 p.m. with no parental or adult supervision. L.F. at 483. While purchasing tickets for the movie, the plaintiff and A.G. met some other friends – Michael, Kenny, Ramsey, and Walter. L.F. at 838. The six teenagers went to see the movie *Jungle 2 Jungle* inside the AMC theater at the shopping center. L.F. at 836.

The plaintiff and A.G. saw Fitzpatrick and his cousin, Tenace, at the movie. L.F. at 836. Fitzpatrick and his cousin sat a few rows behind the girls and playfully tossed ice cubes at them to get their attention. L.F. at 836-37. At some point, the girls became bored with the movie and left the theater. L.F. at 837. Fitzpatrick, his cousin, Michael, Kenny, Ramsey, and Walter followed the girls soon thereafter. L.F. at 837. The group of teenagers proceeded from the theater into the mall's main corridor on the upper level, window shopping as they walked

and talked. L.F. at 837. None of the teenagers were engaged in any type of unusual or suspicious behavior up to this point. *Id.*

The group eventually stopped outside the J.M. Porter's store, which adjoins a recessed atrium near the middle of the shopping center on its east side. L.F. at 488. The atrium overlooks the mall's lower level. A bench, two escalators (leading up and down), an elevator, and an entrance to a short, lighted hallway were within the recessed atrium. L.F. at 488. The bench stood at the top of the escalators to the shopping center's lower level. L.F. at 488. The hallway entrance was on the atrium's south side. The entrance to the hallway – from the atrium – was open (there are no doors), and in this lighted hallway was a pay telephone and a set of doors with "crash bars" leading outside the shopping center. L.F. at 488. The elevator was against the northwest atrium wall. L.F. at 488.

Fitzpatrick and the plaintiff sat on the bench by the escalators while the other teenagers in the group stood around talking. L.F. at 488. Fitzpatrick soon leaned over and kissed the plaintiff on the mouth. L.F. at 489. After the kiss, Fitzpatrick playfully took the plaintiff's purse and retreated to the adjacent hallway near the public pay telephone. L.F. at 488. The plaintiff followed him. L.F. at 488. It is undisputed that there had been no suspicious action by any members of the group up to this point. L.F. at 833-837.

Once in the hallway, the plaintiff asked Fitzpatrick to return the purse, and he jokingly refused unless she gave him another kiss. L.F. at 489. The plaintiff responded by kissing Fitzpatrick while putting her tongue in his mouth. L.F. at 489, 499. She then allowed him to give her several "hickeys" on her neck. L.F. at 489-90. Fitzpatrick then picked up the plaintiff and carried her through the set of crash bar doors to the side of an elevated parking area outside the shopping center known as the catwalk (an uncovered extension on the top level of the mall parking garage). L.F. at 491. Once outside the shopping center, the couple allegedly had sex. L.F. at 497.

There is no witness to the events on the catwalk. The plaintiff's portrayal of her alleged rape is taken from her account. A.G., however, does not believe that the plaintiff was raped. L.F. at 833. She saw the plaintiff laughing and giggling afterwards. L.F. at 840. The plaintiff's first account was not about a rape at all. Instead, she confided in her friend that "we had sex and he didn't use a condom." L.F. at 841.

While the plaintiff and Fitzpatrick were "making out" in the hallway, Fitzpatrick's cousin, Ramsey, and A.G. rode the elevator up and down between the shopping center's upper and lower levels. L.F. at 837-38. They were talking and laughing during the ride. L.F. at 837-38. When the elevator returned to the upper level in the recessed atrium, A.G. noticed that Fitzpatrick and the plaintiff were no

longer sitting on the bench and that the other teenagers in the group were also gone. L.F. at 838-39. A.G. went with Ramsey to look for the others. L.F. at 838. She found her friends (minus Fitzpatrick and the plaintiff) at the other end of the shopping center standing near a video arcade. L.F. at 838. A.G. told the group that she could not find the plaintiff and they then split up and began looking for Fitzpatrick and the plaintiff. L.F. at 838.

A.G. testified in her deposition that while searching for the plaintiff, she told an IPC security officer she could not find her friend and that she believed the plaintiff was with a boy. L.F. at 838. The plaintiff's alleged rape would have been complete by the time A.G. approached the security officer, however, because the next thing she recalled seeing was the plaintiff coming through the shopping center's north entrance doors (a good distance from the site of the alleged rape) with a "happy-go lucky" look on her face. L.F. at 839-40. The plaintiff was laughing and giggling as she approached. L.F. at 839-40. The plaintiff then told A.G. that she wanted to go back downstairs toward the food court. L.F. at 840. The two girls walked over to ride on the down escalator near the mall's north end. When they reached the food court on the mall's lower level, the plaintiff told A.G. that she had unprotected sex with Fitzpatrick on the catwalk outside. L.F. at 839-40.

In her brief, the plaintiff portrays these events as A.G.'s frantic search to find her missing friend and gun-brandishing abductor. A review of A.G.'s deposition reveals a contrary account. The group of teenagers saw what they thought to be a fake gun in Fitzpatrick's pants. L.F. at 839. The gun was never thought to be a threat to anyone because it was fake. There was no indication that any member of the group was concerned enough to notify a security officer when they first saw it. *Id*. A.G.'s deposition testimony is similarly devoid of any fact or testimony regarding her contact of a second security officer. In fact, she only contacted one security officer that was admittedly engaged in breaking up a fight at the time. L.F. at 839, p. 31. A.G. then goes on to testify that she saw the plaintiff "seconds" after she engaged the supposed security officer. L.F. at 843.

**Security at the mall.**

As the mall's security provider, IPC employs off-duty police officers, former Marines, and trained security officers to patrol the premises, which includes the shopping center's common areas and parking lots, but none of AMC Theater's leased space. L.F. at 1308, 767. IPC officers are trained, unarmed, uniformed employees. L.F. at 1308. IPC officers make frequent random security rounds, in cars, from rooftops, and on foot to check the mall's common areas and parking lots, all of which are verified in shift reports prepared by the security officers. L.F. at 1308, 772. Officers report any unusual incidents, hazardous conditions,

accidents, defects, suspicious activities, or criminal activities observed during the shift. L.F. at 1309. At the end of each shift, a security log, noting any unusual incidents, hazardous conditions, accidents, defects, suspicious activities or criminal activities are reported to mall management. L.F. at 1309. IPC also enforces rules and regulations that are mutually agreed-upon by mall management and IPC. L.F. at 1309.

**The mall's alleged crime problem.**

Contrary to the plaintiff's portrayal of the mall's crime history, there has never been a reported rape on the premises while IPC patrolled the property. But there was an eighty-five percent decrease in assaults comparing the first quarter of 1997 to the first quarter of the previous year. L.F. at 1207. A one-hundred-percent decrease in batteries and unlawful entries was reported in the same timeframe, as well as a twenty-eight percent decrease in thefts under $300. One-hundred-percent decreases were reported for unlawful use of weapons and possession of controlled substances, a seventy-five percent decrease in identification of suspicious persons, an eighty-eight percent decrease in damaged property and a one hundred percent decrease in juveniles reported missing. L.F. at 1207-1208.

POINT RELIED ON

**THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FAVOR OF IPC INTERNATIONAL CORPORATION BECAUSE IPC HAD NO DUTY TO PROTECT L.A.C. FROM A THIRD-PARTY CRIMINAL ACT IN THAT (A) THE PLAINTIFF WAS NOT A THIRD-PARTY BENEFICIARY OF THE CONTRACT BETWEEN IPC AND G.G. MANAGEMENT, OR AT MOST MERELY AN INCIDENTAL BENEFICIARY WITH NO STANDING TO SUE; (B) A PARTY CANNOT ASSUME A DUTY THAT DOES NOT OTHERWISE EXIST, AND THE TRIAL COURT CORRECTLY DETERMINED THAT NO DUTY EXISTED IN ITS ANALYSIS OF L.A.C.'S CLAIMS AGAINST THE SHOPPING CENTER'S OWNERS AND MANAGER; (C) NO REPRESENTATIONS WERE MADE ABOUT HER SAFETY, WHICH MISSOURI LAW REQUIRES FOR A BUSINESS TO ASSUME A DUTY TO PROTECT INVITEES AGAINST CRIME; AND (D) MISSOURI DOES NOT RECOGNIZE TORT CLAIMS FOR MERE BREACH OF CONTRACT.**

*Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517 (Mo. App. 1998).

*Madden v. C&K Barbecue Carry Out,* 758 S.W.2d 59 (Mo. banc 1988).

*Decker v. Gramex Corp.*, 758 S.W.2d 59 (Mo. banc 1988).

*Keenan v. Miriam Foundation*, 784 S.W.2d 298 (Mo. App. 1990).

## ARGUMENT

**THE TRIAL COURT CORRECTLY ENTERED JUDGMENT IN FAVOR OF IPC INTERNATIONAL CORPORATION BECAUSE IPC HAD NO DUTY TO PROTECT L.A.C. FROM A THIRD-PARTY CRIMINAL ACT IN THAT (A) THE PLAINTIFF WAS NOT A THIRD-PARTY BENEFICIARY OF THE CONTRACT BETWEEN IPC AND G.G. MANAGEMENT, OR AT MOST MERELY AN INCIDENTAL BENEFICIARY WITH NO STANDING TO SUE; (B) A PARTY CANNOT ASSUME A DUTY THAT DOES NOT OTHERWISE EXIST, AND THE TRIAL COURT CORRECTLY DETERMINED THAT NO DUTY EXISTED IN ITS ANALYSIS OF L.A.C.'S CLAIMS AGAINST THE SHOPPING CENTER'S OWNERS AND MANAGER; (C) NO REPRESENTATIONS WERE MADE ABOUT HER SAFETY, WHICH MISSOURI LAW REQUIRES FOR A BUSINESS TO ASSUME A DUTY TO PROTECT INVITEES AGAINST CRIME; AND (D) MISSOURI DOES NOT RECOGNIZE TORT CLAIMS FOR MERE BREACH OF CONTRACT.**

The trial court properly rejected the plaintiff's claims because they are barred by longstanding Missouri precedents showing that, under the circumstances of this case, there is no duty to protect a business invitee from the unanticipated criminal attack of a third person. *See Wood v. Centermark Properties, Inc.*, 984

S.W.2d 517 (Mo. App. 1998); *Madden v. C&K Barbecue Carry Out*, 758 S.W.2d 59 (Mo. banc 1988); *Decker v. Gramex Corp.*, 758 S.W.2d 59 (Mo. banc 1988). The Court should reject the plaintiff's request that the defendants be made the insurers of her safety in the absence of any relationship to support such a duty.

Although she argues it as her last point relied on, the plaintiff's baseless contention that she should be considered a third-party beneficiary under the mall security contract between G.G. Management Company and IPC is at the heart of this case. This claim ignores the fact that, in Missouri, there is a strong presumption that parties contract for themselves and not for the benefit of others. *OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. App. 1995); *Laclede Inv. Corp. v. Kaiser*, 596 S.W.2d 36, 42 (Mo. App. 1980); *Wood*, 984 S.W.2d at 526. An alleged third-party beneficiary must show an implication in the contract tantamount to an express declaration by the contracting parties in order to overcome this presumption. *Laclede Inv. Corp.*, 596 S.W.2d at 42. The plaintiff cannot achieve third-party beneficiary status absent such a declaration, which is not present in this case. *See Chmieleski v. City Prod. Corp.*, 660 S.W.2d 275, 289 (Mo. App. 1983). The plaintiff could, at most, be a mere incidental beneficiary to the shopping center security contract, and not an intended beneficiary who could assert a claim of breach of contract.

In a related argument, the plaintiff claims that IPC somehow voluntarily assumed a tort duty to protect her because it entered into the contract to provide security services at the mall. This claim fails for at least three reasons. First, IPC could not assume a duty that did not otherwise exist. *See, e.g., Horstmyer v. Black & Decker, (U.S.), Inc.*, 151 F.3d 765, 774 (8th Cir. 1998); *Davidson v. Besser Co.*, 70 F. Supp. 2d 1020, 1027 (E.D. Mo. 1999) (both applying Missouri law). Because the mall's owners and manager had no duty to protect the plaintiff from the alleged risk of violent crime at the mall, there was no duty for IPC to assume.

Second, Missouri only recognizes certain exceptions to the general rule of no liability, one being that a business can assume a duty to protect an invitee against violent crime only when it makes express representations to the invitee assuring his or her safety. *Keenan v. Miriam Found.*, 784 S.W.2d 298, 304 (Mo. App. 1990). No such assurances were made here.

Third, as a rule, Missouri does not recognize a third-party's right to sue in tort for breach of contract. *Preferred Phys. Mut. Mgmt. Group v. Preferred Phys. Mut. Risk Retention*, 918 S.W.2d 805, 814 (Mo. App. 1996). In the rare instances where such a tort claim has been permitted, there was a relationship so close between the contracting party and the third party that the courts found the equivalent to privity of contract, a relationship that is absent in this case.

The trial court's judgment in favor of IPC should be affirmed.

### A. Standard of review.

IPC agrees that the standard of review with respect to a summary judgment motion is de novo. *Kujawa v. Billboard Café at Lucas Plaza, Inc.*, 10 S.W.3d 584, 588 (Mo. App. 2000). The standard of review for a motion for judgment on the pleadings is also de novo. *Barker v. Danner*, 903 S.W.2d 950, 957 (Mo. App. 1995).

### B. The plaintiff is not a third-party beneficiary.

The trial court correctly entered judgment on the pleadings in favor of IPC on the plaintiff's contractual third-party beneficiary claim because she was not a third-party beneficiary of the contract between IPC and G.G. Management. If she was a beneficiary at all, the plaintiff was merely an incidental beneficiary with no standing to sue.

The plaintiff selectively reads the contract out of context in an attempt to claim more than incidental benefit from the agreement, but reading the entire contract reveals that the plaintiff is not an intended third-party beneficiary. For the Court's convenience, a copy of the security contract is included in the appendix to this brief. Because the plaintiff cannot show that IPC and G.G. Management agreed to terms that clearly expressed an intent to benefit her, her third-party beneficiary claim fails. *Volume Services, Inc. v. C. F. Murphy & Assoc., Inc.*, 656 S.W.2d 785, 794 (Mo. App. 1983).

The intent to confer third-party beneficiary status is "not simply a desire to advance the interests of another, but rather an intent that the promisor assumes a direct obligation to him." *Id.* at 794. To prevail on this claim, the plaintiff in this case must show that the security contract was entered into *for her benefit* – that G.G. Management and IPC formed the contract directly to benefit her and clearly expressed this intent in the contract itself. *See Chmieleski v. City Prod. Corp.*, 660 S.W.2d 275, 289 (Mo. App. 1983). A contracting party's mere desire to confer a benefit on a third party, or to advance a third party's interests, or to promote welfare, is insufficient. *Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517, 527 (Mo. App. 1998). The plaintiff's burden is to show an express intent to assume a direct obligation to the plaintiff. *McKenzie v. Columbian Nat'l Title Ins. Co.*, 931 S.W.2d 843, 845 (Mo. App. 1996); *Roskowske v. Iron Mountain Forge Corp.*, 897 S.W.2d 67, 72 (Mo. App. 1995).

The recent case of *Hudson v. Riverport Performance Arts Centre*, 37 S.W.3d 261 (Mo. App. 2000), is instructive. The plaintiff was a patron of a theatre who alleged that he had been assaulted by another patron. Two or three minutes prior to the assault, the plaintiff and another man "had exchanged some words." The other man then walked away, but then approached the plaintiff a second time and struck the plaintiff with a bottle. The theatre owner had entered into a contract with another company for security. On the night in question, the security company

had employed 90 security personnel, 14 of whom were patrolling the area in which the altercation took place. Two or three security personnel were standing approximately twenty feet from the events but were unaware of the attack until afterward. As in this case, the plaintiff claimed to be a third-party beneficiary of the security contract. As in this case, the trial court rejected the claim. Relying on *Wood* and "the strong presumption parties contract for themselves," the Missouri Court of Appeals affirmed. 37 S.W.3d at 266. Similarly, in this case, the judgment of the trial court should be affirmed.

The mall security contract specifically outlines IPC's obligations to provide security services at the mall. Nowhere in the contract does it provide that mall customers are a class of persons protected by IPC. There is no language in the contract that evidences a clear and direct intent to benefit the plaintiff or create an obligation in her favor. For instance, she relies on the indemnification clause to support her third party beneficiary theory. The indemnification clause in the contract is nothing more than a method to allocate risk and predetermine reimbursement ***among contracting parties*** for a loss. *Dixon v. Holden*, 923 S.W.2d 370, 376 (Mo. App. 1996). It in no way supports the plaintiff's third-party beneficiary theory.

Nor can the plaintiff create third-party beneficiary status by referring to IPC training manuals or other documents apart from the actual contract. A written

contract presumably embodies a party's entire agreement. *Brewer v. Devore*, 960 S.W.2d 519, 522 (Mo. App. 1998). The plaintiff's resort to reading IPC policy and procedures conjunctively with the security contract to claim third-party beneficiary status is unpersuasive because the security contract is not ambiguous. Absent ambiguity, a court must determine the contracting parties' intent from the four corners of the contract. *Farm Bureau Town & Country Ins. of Mo. v. Hilderbrand*, 926 S.W.2d 944, 947 (Mo. App. 1996). IPC's policy and procedures manual cannot form a part of the security contract because the manual and the contract were not created at the same time. *Greenberg v. Dowdy*, 930 S.W.2d 512, 514 Mo. App. 1996).

Further, IPC's manuals and other training materials are used at all properties that it serves, regardless of whether G.G. Management is the managing entity. The manuals are intended for employee informational purposes only and they are not contracts. The very language of the IPC Policy and Procedure Manual expressly refutes the plaintiff's theory in that it states: "This book is not a contract. The contents of this book are presented as a matter of information only." L.F. at 1582.

Aside from the manual's express language, Missouri law provides that a company's safety policies do not create a legal duty. *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 133 (Mo. App. 1993). To hold otherwise would

discourage the voluntary development of guidelines to provide for customers' general safety. *Id*.

Even if the plaintiff were a third-party beneficiary under IPC's security contract (which she is not), it does not automatically follow that she would have standing to sue for its breach. Missouri recognizes three types of third party beneficiaries: creditor, donee, and incidental. Only creditor and donee beneficiaries may sue for breach of contract. *Wood*, 984 S.W.2d at 526. Incidental beneficiaries have no such right. *Id.*

A person is a creditor beneficiary if performance of the promise at issue will satisfy a duty of the promisee (here G.G. Management) to the beneficiary. A person is a donee beneficiary of a promise if the promisee intended that the promisor (here IPC) assumes a direct obligation to the beneficiary. *Id.* at 527. All other third-party beneficiaries are mere incidental beneficiaries. *See id.* at 526-27.

As *Wood* makes clear, patrons such as the plaintiff are at best incidental beneficiaries to a contract between a security company and a mall's owner or manager. *Id.* at 526-27. Certainly, a customer may derive incidental benefit from security at a mall, but patrons are not creditor or donee beneficiaries absent a clear expression in the security contract of a direct obligation which runs to them. *Id.* at 527. The incidental benefit the plaintiff might receive from the contract is a far cry from creating a legal duty owed to her. *Id.*

The plaintiff attempts to distinguish *Wood* in the third-party beneficiary setting because the contract at issue in that case was between the mall owner/manager and a retail tenant, as opposed to this contract, which involves a security company. But the contract at issue in *Wood* included charges for policing public areas and for providing security in public areas. *See id.* at 527. Centermark was contractually obligated to its tenant to provide protection for employees and patrons in its parking lots. *See id.* The *Wood* contract was a security contract in fact and effect if not in name. The *Wood* court properly classified the decedent as an incidental beneficiary and refused to impose liability on the contracting parties.

The analysis of whether the mall employee in *Wood* was a third-party beneficiary is the same analysis to be used here. The Court should consider from the express contractual language whether the parties (IPC and G.G. Management) intended to make the plaintiff a third-party beneficiary. They did not. *Wood* denies mall patrons third-party-beneficiary status. *Wood,* 984 S.W.2d at 527. There is no distinction that would warrant a different holding than that in *Wood*.

The plaintiff's reliance on an unreported decision of the Ohio Court of Appeals for the proposition that an invitee is a third party beneficiary to a security contract is also misplaced. *McCullion v. Ohio Valley Mall Co.*, No. 97 C.A. 175, 2000 WL 179368 (Ohio Ct. App. Feb. 10, 2000), actually bolsters IPC's point. The contract at issue in that case expressly required the security company to

"protect all persons and property." *Id*. at *4. There is no such provision in the IPC contract.

### C. IPC did not undertake a duty to assure the plaintiff's safety.

In a related issue, the plaintiff claims that the contract between IPC and the mall's management company imposed a duty on IPC to insure her safety. There was no such duty in this case.

Missouri only recognizes three very limited exceptions to the general rule of a business owner's non-liability for the criminal acts of a third party: (1) where personal assurances of safety are made to the plaintiff in a high crime area; (2) where a special relationship exists, such as that between in innkeeper and its guests; or (3) where certain prior violent crimes create an exception to the general no duty rule. *See Keenan*, 784 S.W.2d at 303; *Virginia D. v. Madesco Investment Corp.*, 648 S.W.2d 881, 885-86 (Mo. 1983); *Madden*, 758 S.W.2d at 61. If none of these exceptions apply, the general non-liability rule must be followed. *Keenan*, 784 S.W.2d at 303.

The assumed-duty theory is only recognized in limited situations such as those found in *Keenan v. Miriam Foundation, supra*. In *Keenan*, a woman wanted to donate several items to charity. Before she delivered her donations, the woman called the foundation and was told to bring the items later that afternoon when someone would be available to help her unload them. When she arrived at the

foundation, she met an employee who asked her to drive around back of the building so that her items could be unloaded. The woman responded that she did not want to go in back of the building, but the foundation employee assured her that everything would be alright. When the woman went to the back of the building and began unloading her donations, she was attacked.

The woman sued the foundation on an assumption-of-duty theory because of its employee's personal assurance that the woman would be safe. The Missouri Court of Appeals, Eastern District, upheld the jury's verdict in favor of the woman, finding that the foundation had assumed a duty to protect her based on its employee's personal assurances that she would be safe and that someone would meet her at a particular location to protect her. *Keenan*, 784 S.W.2d at 304-306. The *Keenan* court found that the defendant had assumed a duty to the woman because of its affirmative personal assurances to protect her from harm. *Id*. at 304.

The plaintiff in this case has never alleged that anyone from IPC ever personally assured her safety while she patronized the mall. She never spoke to an IPC employee. Nor did anyone assure her that she would be safe at the mall. No facts exist to support such a contention. Absent personal assurances of her safety, the plaintiff's assumed duty theory fails. *Id*. at 301.

Nor can it be said that IPC assumed a duty to the plaintiff merely because it is a security company. The provision of security services does not in and of itself

give rise to a duty to protect customers from crime, as the *Wood* court expressly recognized. *Wood*, 984 S.W.2d at 525-26. IPC's officers are members of the public just like the plaintiff, with no duty to rescue or protect patrons, as illustrated by *M.C. v. Yeargin*, 11 S.W.3d 604 (Mo. App. 1999).

The plaintiff in *Yeargin* was a guest at a hotel. As she was leaving for a business meeting, Yeargin pushed her back into her room. Security was called after loud voices were heard in the guest's room. As security officers approached the room, they heard two comments: "Please don't kill me," and "Shut-up, bitch, or I'm going to kill you." The responding security officers decided not to intervene. Yeargin raped the guest while the security officers waited in the hall. The guest claimed that the hotel's security officers were negligent in failing to rescue her. In reversing the jury's verdict in favor of the guest and remanding the case for new trial, the court of appeals refused to impose a duty on the security officers to rescue patrons in distress. *Id.* at 613.

Compare this case to *Yeargin*. In *Yeargin*, the security guards were fully aware that the guest was in grave danger, yet they waited outside of her room as she was raped. The *Yeargin* court correctly refused to find a duty to rescue the plaintiff. In this case, there is no evidence that any IPC security officer knew of the plaintiff's alleged rape in sufficient time to prevent it. Indeed, A.G. did not even notify an IPC officer of the plaintiff's claimed peril until a few seconds

before the plaintiff walked back into the mall. If the security officers in *Yeargin* were not required to rescue the guest, it cannot logically be argued that IPC security officers had a duty to protect the plaintiff when they never knew of the alleged rape in time to prevent it.

Other jurisdictions follow *Yeargin's* logic. In *Abner v. Oakland Mall Ltd.*, 531 N.W.2d 726 (Mich. Ct. App. 1995), the plaintiff was a mall employee who was raped in the mall's parking lot. The employee sued the mall and the security company alleging that each had failed to make the premises reasonably safe. *Id*. at 737. The *Abner* court noted that suit may not be maintained on the theory that the existing safety measures are less effective than they could or should have been. *Id*. at 728; *see also Washington v. United States Dept. of Housing and Urban Dev.*, 953 F. Supp. 762 (N.D. Tex. 1996); *Nixon v. K&B, Inc.*, 649 So. 2d 1087 (La. Ct. App. 1995); *Four Aces Jewelry Corp. v. Smith*, 684 N.Y.S.2d 224 (App. Div. 1999).

The plaintiff's reliance on cases from other jurisdictions is misplaced. She cites *Holshouser v. Shaner Hotel Group Props. One Ltd. Ptnrshp.*, 518 S.E.2d 17 (N.C. Ct. App. 1999), claiming that she was raped *because* the defendant security company failed to deliver its promised services. The *Holshouser* court merely noted, on readily distinguishable facts, that the plaintiff in that case had provided sufficient factual evidence to withstand a motion for summary judgment on the

issue of whether the defendants acted negligently. *Id*. at 24. That decision did not find that the plaintiff was raped because of the defendant's inaction, nor did it find that the security company was liable for the plaintiff's injuries.

The plaintiff also cites to *Professional Sports, Inc. v. Gillette Security, Inc.*, 766 P.2d 91 (Ariz. Ct. App. 1988), for the notion that a security company, by the very nature of its business, is liable for crimes on property that it patrols. *Professional Sports* is not even a third-party case, but rather a direct action between the two contracting parties. It has no relevance to this case.

Furthermore, the analysis in *Professional Sports* is fundamentally inconsistent with Missouri law and provides no support for the plaintiff's claims in this case. *Professional Sports* arose from a ballpark promotion, Fifty-Cent Beer Night. The ballpark's arrangement with the security company called for the security company "to monitor alcoholic beverage service and consumption inside its grounds. This included the detection of underaged persons attempting to purchase and consume alcohol." *Id.* at 92. A sixteen-year-old minor and his two seventeen-year-old friends attended the game and illegally obtained beer: "Although David does not recall purchasing any beer, his friends purchased between six and eight rounds at the stadium's concession stands. During the course of the game, David drank and became increasingly intoxicated and unruly." *Id.* The minor was injured after he left the ballpark: "David was obviously

intoxicated—he was stumbling and slurring his speech. The three boys wandered about the parking lot and eventually made their way to Van Buren Street. As David attempted to cross the street, an automobile struck and severely injured him." *Id.* The minor sued the ballpark, which commenced a third-party claim against the security company.

In *Professional Sports*, the trial court granted summary judgment in favor of the security company on the third-party claim, but the intermediate court of appeals reversed. The appellate court held that providing security was enough to make the security company liable ***to the ballpark*** to protect the plaintiff from his own voluntary intoxication: "It is undisputed that Gillette's guards were on duty the night of the accident. Thus, at the very least, Gillette commenced performance of its obligation to provide security services pursuant to its contract, which included the control of underaged drinking." *Id.* at 924. In this matter, *Professional Sports* obviously does not support the plaintiff's claim as an alleged third-party beneficiary. Furthermore, as noted, IPC in this case was not under any contractual duty to safeguard the plaintiff.

**D. The plaintiff has no tort claim based upon breach of contract.**

The plaintiff also attempts to fabricate a tort duty on IPC's part for breach of the shopping center's security contract. She argues that breach of the security contract creates a tort duty to her, indeed to all the mall patrons, to protect them

from harm. But Missouri does not recognize a tort cause of action for mere breach of contract. *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 229 (Mo. App. 1995). The plaintiff disregards this simple principle and relies on a surety case to support her position. *See Westerhold v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1967). A review of *Westerhold's* facts and reasoning demonstrates the plaintiff's flawed logic.

*Westerhold* involved an indemnitor of a construction surety that sued an architect when it falsely certified progress payments to the project owners. *Id*. at 74-76. Westerhold contracted with the St. Louis Archdiocese to construct a church in accordance with Carroll's architectural drawings and specifications. Westerhold, as principal, and Maryland Casualty Company, as surety, executed a performance bond in the archdiocese's favor. As an inducement to Maryland Casualty to execute the bond, Westerhold agreed to indemnify Maryland Casualty against any liability for damages it might sustain by reason of executing the bond.

Under the contract terms with the archdiocese, Westerhold's performance was to be supervised by Carroll. Payments by the archdiocese to Westerhold were conditioned upon Carroll's certification that Westerhold continued to progress on the job to be performed. Carroll certified several times that Westerhold had completed work and had furnished materials equal to the amount that the archdiocese paid. The archdiocese relied upon Carroll's representations to it about

the progress of the construction project when it paid Westerhold, but the amount of work actually performed was substantially less than the value certified by Carroll.

When Westerhold defaulted on the contract, Maryland Casualty, as surety, carried out the terms of the construction contract. Maryland Casualty, in turn, made demand upon Westerhold for payment pursuant to the indemnity agreement, claiming its losses were caused by Carroll's negligence as the architects. Westerhold sued Carroll not as a surety, but as the surety's indemnitor. Thus, the issue was whether, in the absence of privity, Carroll owed Maryland Casualty Company a duty to exercise ordinary care when it made the certifications.

In analyzing the issue, the *Westerhold* court recognized the longstanding rule that one who was not a party to a contract could not recover for its negligent performance. *Id*. at 76. This has always been and continues to be the general rule in Missouri since *Roddy v. Missouri Pacific Railway*, 104 Mo. 234, 15 S.W. 1112 (1891), which held that an employee of a quarry owner could not sue a railroad for negligent performance of a contract. "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority." *Id*. at 1112.

The rationale for this rule is two-fold: (1) legal protection of this kind leads to excessive and unlimited liability; and (2) recognition of such a duty would restrict and embarrass the right to make contracts "by burdening them with

obligations and liabilities to others which parties would not voluntarily assume." *Id*. at 1112. Both of these policy concerns are present here.

The *Westerhold* court expressly stated that creating any exception to the general rule should only be done on a case by case basis "with a careful definition of the limits of liability depending on the differing conditions and circumstances to be found in the individual cases." *Westerhold*, 419 S.W.2d at 78. The *Westerhold* court ultimately recognized a very limited and narrow exception to privity in that case which allowed a third party to sue in tort for breach of the contract because the relationship between the non-contracting party and the contracting party was so close "as to approach that of privity." *Id*. at 78. This exception was never intended to be a "liability in an indeterminate amount for an indeterminate time to an indeterminate class for any thoughtless slip or blunder or inattention that might fairly be spoken of as negligence." *Id*. at 78.

The facts that led the *Westerhold* court to recognize a duty in tort to a third party are simply not present here. The *Westerhold* court relied upon the fact that the contract's purpose was to protect the non-contracting party as much as the contracting party. *Id*. at 79. The object of the contract was for third parties' benefit. That is not true here because, as noted, the security contract was never intended to make IPC an insurer of public safety.

Significantly, the holding in *Westerhold* does not lead to excessive or unlimited liability, or to endless complications. *Id*. at 79. The *Westerhold* plaintiff was a known party and liability could not extend beyond that one party. But the holding requested by the plaintiff in this case would allow any member of the public to have a cause of action for any contractual breach no matter how insignificant. That is the concern that led the *Westerhold* court to declare that its holding was expressly limited to its facts. *Id.* at 78.

It has long been the rule in Missouri that a breach of contract does not give rise to tort liability. *Preferred Phys. Mut. Mgmt. Group*, 918 S.W.2d at 815. In *Anderson v. Boone County Abstract Co.*, 418 S.W.2d 123 (Mo. 1967), for example, the Court refused to permit a third party to sue for negligent certification of an abstract. Boone County Abstract had prepared an abstract for the previous owners of Anderson's land but it negligently omitted a restricted covenant on the property. *Id*. at 124. When Anderson became the property owner, it wanted to use the property for commercial and business purposes. The covenant, absent from the Boone County's abstract, prohibited such use. Anderson sued Boone County Abstract because of its negligent certification of the property.

The *Anderson* Court refused to create any exception to the general rule that third parties cannot maintain action in tort without privity of contract: "It would widen the circle of liability to extend it to those who are in many cases actually

aware of the existing limits of liability of the abstracter and who, by their own choice from economic considerations, neglect to bring themselves within the limits of such liability." *Id*. at 127. The Court stated that it would not permit an exception that would extend liability to persons not dealing with the party with whom the abstract company dealt.

The result should be no different here. Recognizing a tort duty for breach of contract in this instance would permit liability to an indiscriminate and indeterminate class – a class that is ever-shifting and ever-changing. The plaintiff was never intended to benefit from the contract between IPC and G.G. Management. She was a member of the public at large and nothing more. Her alleged injuries, although unfortunate, do not allow her to sue IPC in tort. She lacks privity and proximity to the contract between IPC and G.G. Management and therefore does not have a right to sue in tort.

**E. The facts do not give rise to a duty of care.**

As noted, the contract was insufficient to create a duty on the part of IPC in favor of the plaintiff. Furthermore, the undisputed facts lack the history of similar violent crimes necessary for ***any*** defendant to be charged with a duty of care.

All parties agree that, in order to recover on her negligence claim, the plaintiff must prove that (1) the mall's owners and manager had a duty to protect her from the injury of which she complains; (2) breach of their duty to the plaintiff;

(3) causation; and (4) injury to the plaintiff resulting from their breach. *Madden*, 758 S.W.2d at 61. The issue presented to the Court on the plaintiff's claim for negligence is whether the defendants had a duty to the plaintiff to protect her from Fitzpatrick's alleged attack. The issue of duty is a pure question of law for the Court to decide. *Wood*, 984 S.W.2d at 523.

There are sound policy reasons for refusing to impose a duty on business owners for the criminal acts of third parties: (1) a deliberate criminal act by a third-party as an intervening cause; (2) the difficulty that exists in determining the foreseeability of criminal acts unfairly saddles the landowner with predicting future crime; (3) the economic consequences of imposing a duty on the business owner and; (4) the notion that protecting private citizens is the government's duty rather than the duty of the private sector. *Wood*, 984 S.W.2d at 524; *see also Knop v. Bi-State Dev. Agency*, 988 S.W.2d 586, 589 (Mo. App. 1999). Every single one of those policy concerns is present in this case.

Even in light of those valid policy concerns, a duty may arise to protect an invitee if the landowner knows or has reason to know from past crime experience that there is a likelihood of a specific crime occurring on the property at issue. *Madden*, 758 S.W.2d at 62; *Wood*, 984 S.W.2d at 524. If so, the landowner must take reasonable precautions to protect invitees. This very limited exception has become known as the "special circumstances" or "prior violent crimes" exception

to the general rule of landowner non-liability. (Another very limited exception to the general rule of landowner non-liability also exists where there is a special relationship, such as that of innkeeper and guest. The facts of this case do not warrant discussion of this exception, and the plaintiff has not argued it.)

The prior violent crimes exception to the general non-liability rule only applies if (1) the landowner encouraged the plaintiff to come onto the premises; (2) specific prior crimes on the premises exist that are numerous and recent enough to put the landowner on notice that there is a likelihood of danger to invitees by a third-party; and (3) the subject incident is sufficiently similar in type to the prior specific incidents that a person would take reasonable precautions to protect the invitee. *Faheen v. City Parking Corp.*, 734 S.W.2d 270, 273-74 (Mo. App. 1987); *Wood*, 984 S.W.2d at 524. The last two requirements are at issue in this appeal.

When analyzing a property's crime history, Missouri courts have clearly held that not all crimes should be considered. *See Groce v. Kansas City Spirit, Inc.*, 925 S.W.2d 880, 885 (Mo. App. 1996); *Wood*, 984 S.W.2d at 524. To fall within the "violent crimes" exception, past crimes (1) must occur on the premises at issue; (2) indoor or outdoor crimes are excluded depending on the subject crime's location; and (3) crimes involving a perpetrator's escape are excluded. *Wood*, 984 S.W.2d at 524 (citing *Keenan v. Miriam Found.*, 784 S.W.2d 298 (Mo. App. 1990); *Pickle v. Denny's Restaurant, Inc.*, 763 S.W.2d 678, 681 (Mo. App.

1988); *Brown v. National Super Markets, Inc.*, 731 S.W.2d 291, 294 (Mo. App. 1987)). The prior crimes do not have to be identical to the subject crime, but they must share common elements with the subject crime to put the landowner on notice that the subject crime might occur. Missouri courts have previously defined such crimes as assault, robbery, murder, and rape as violent crimes for purposes of this analysis. *Id.*

Although the plaintiff argues such limiting factors should not apply, they have clearly and appropriately been applied in other third-party premises liability cases. *See Pickle v. Denny's Rest. Inc.*, 763 S.W.2d at 681; *Wood,* 984 S.W.2d at 524. The plaintiff relies heavily on *Madden's* dicta to argue that its holding changed the focus of third-party premises liability cases from the "special relationship" criteria to one of pure foreseeability. She asks this Court later in her brief to adopt the foreseeability approach which is used in California, Louisiana, and Tennessee. *Madden's* dicta admittedly suggests that foreseeability is the rationale behind the analysis. *Id.* But the *Madden* Court did not announce that foreseeability is the sole determining factor of a land occupier's duty. *See Miller v. South County Ctr*., 857 S.W.2d 507 (Mo. App. 1993).

Indeed, such an interpretation of *Madden* has been rejected by all of the decisions since *Becker v. Diamond Parking Inc.*, 768 S.W.2d 169 (Mo. App. 1989). Although the court in *Becker* did express a view that *Madden* "changed the

focus of premises liability cases from the special circumstances and special relationship criteria to the concept of what is foreseeable," such discussion is mere dicta and is not supported by the Court's discussion or holdings in *Madden*. In fact, the cases subsequent to *Madden* have uniformly required a plaintiff to show a legally sufficient number of prior criminal incidents before a duty upon a business owner to protect or warn its invitees will be imposed as a matter of law. *Miller v. South County Ctr. Inc.*, 857 S.W.2d 507 (Mo. App. 1993); *Keenan v. Miriam Found.*, 784 S.W.2d 298, 303 (Mo. App. 1990); *Claybon v. Midwest Petroleum Co.*, 819 S.W.2d 742, 747 (Mo. App. 1991); *see also Schlep v. Cohen-Esrey Estate Servs.*, 889 S.W.2d 848, 851 (Mo. App. 1995). Merely declaring that injury is "foreseeable" is insufficient unless a legally sufficient number of past similar crimes exists – which they do not. Here, the plaintiff cannot circumvent that requirement by arguing her alleged rape was foreseeable. She must establish a sufficient crime history in order to carry her burden.

This is the standard and should remain so in Missouri because predicting third-party criminal acts is nearly impossible for a land occupier. Crime is foreseeable in a very general sense everywhere in today's society. *Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. App. 1983). Even using past criminal activity as an indicator of whether future crimes are foreseeable is inherently uncertain. *Goldberg v. Housing Auth.*, 186 A.2d 291, 297 (N.J.

1962). This Court should not complicate that uncertainty by abandoning objective criteria of requiring past crimes to establish a legal duty. This would make the landowner an insurer of invitees' safety and this has never been the case in Missouri. *Madden*, 758 S.W.2d at 65.

The court of appeals recognized these inherent problems in *Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517 (Mo. App. 1998). Barbara Jo Wood was employed at a mall owned and managed by Centermark. In January of 1994, Wood was abducted from the mall at gunpoint and murdered elsewhere. The *Wood* plaintiffs sued Centermark for wrongful death, claiming that Centermark owed a duty to exercise ordinary care to prevent criminal attacks on its property.

The *Wood* plaintiffs set forth in their petition eighty prior crimes at the mall including assaults, purse snatchings, indecent acts, shoplifting incidents, burglaries/robberies and acts of child abuse, all of which took place between 1989 and 1994. Centermark moved for summary judgment, arguing the mall's crime history did not justify use of the prior violent crimes exception. The trial court agreed. The court of appeals affirmed the trial court's entry of summary judgment and held that the eligible past crimes at the mall were insufficient to engage the prior violent crimes exception. *Id*. at 524-25.

In analyzing the case, the *Wood* court sifted through all irrelevant crimes alleged by the plaintiffs and found that only twenty of the original eighty crimes

were truly "similar." The majority of the crimes that occurred at the mall in *Wood*, just as those incidents alleged here, involved fist fights between mall patrons, crimes against property or altercations between fleeing suspects and the apprehending security officer. *Id.* at 525. The court specifically noted that there was no serious bodily harm involved. The *Wood* court correctly recognized that such crimes were insufficient to engage the prior violent crimes exception even if they occurred on the mall's property.

Contrary to the plaintiff's assertions, this case is, for all relevant purposes, identical to *Wood*. Here, the plaintiff focuses on thirty-seven crimes (as opposed to the eighty alleged in *Wood*) which she argues are sufficiently similar and recent enough to engage the prior violent crimes exception. Not one of them is a prior rape. She argues that Missouri courts have consistently held that seven to fourteen prior crimes are sufficient to engage a business owner's duty. Obviously, as *Wood* clearly demonstrates, that is not true. The *Wood* court considered twenty prior crimes and still refused to impose a duty on the property owner.

Applying *Wood*'s rationale to the mall's crime history, it is clear that the number of crimes at the mall is legally insufficient to give rise to a duty to protect the plaintiff. (The plaintiff makes passing references to other incidents in addition to the thirty-seven crimes she singles out, but offers no specific facts about any of them.) It is the plaintiff's burden to show a legally sufficient number of prior

specific crimes, which the plaintiff fails to accomplish here. *See id.* The chart set forth in the substitute brief of the malls owners and managers (at page 17) reveals that the plaintiff's attempted portrayal of the mall's crime history is a terrific distortion and expansion of relevant crimes. Of the thirty-seven incidents specifically referenced, eighteen occurred inside the shopping center and should be excluded because of their location. *Wood*, 984 S.W.2d at 524; *Pickle*, 763 S.W.2d at 681. Three more incidents occurred in the AMC theaters, which IPC does not patrol or control, and which should also be excluded as a result. *Wood*, 984 S.W.2d at 425; *Faheen*, 734 S.W.2d at 272; *see also Keenan v. Miriam Found.*, 784 S.W.2d 298 (Mo. App. 1990). That leaves sixteen arguably eligible crimes.

The remaining sixteen crimes on which the plaintiff relies do not demonstrate a pattern of specific violent crimes which would justify the exception to the general no liability rule. They are largely, as the *Wood* court noted, incidents with no attempt at serious bodily harm. *Wood*, 984 S.W.2d at 525. While the plaintiff severely misrepresents the nature and extent of these crimes, she cannot hide the fact that there is no evidence of a prior rape while IPC patrolled the property. For example, the incident cited as an assault requiring the victim's transportation to a local hospital was actually for minor scrapes and abrasions from being pushed down. L.F. at 1027-29. Two alleged "armed robberies" were classified as such because the victims felt something hard against

their body "like a gun." L.F. at 935-36, 1074-75. It was never confirmed that those incidents were anything more than simple theft. IPC was never notified of the alleged sexual assault that occurred between two mall employees to which the plaintiff refers. L.F. at 416-18. One "incident" on which the plaintiff relies indicates the "victim" and "offender" were "only playing." L.F. at 1087-89. This is hardly a violent crime. These sorts of incidents are not even close to the type of crimes that would be valid indicators or predictors of the potential for a rape on the catwalk at the mall.

The plaintiff also relies on three alleged sexual incidents, in particular, to establish a duty. Those incidents can be easily dismissed. She cites a 1992 rape, a sexual assault, and a sexual attack on a fourteen-year-old girl. The 1992 rape occurred before IPC patrolled the mall and it is only referenced once in a "call to service" report prepared by the Kansas City Police Department. L.F. at 876. There is no indication that IPC had notice of it even after it became the security contractor at the mall; it is not mentioned in any IPC incident report. The sexual assault (discussed above) occurred between two mall employees who knew each other, and IPC was not notified of the incident. L.F. at 416-18. It also occurred inside the shopping center and should be excluded on that basis. *Pickle*, 763 S.W.2d at 681. The alleged sexual attack on the fourteen-year-old girl occurred at the AMC theaters complex, which is not patrolled by IPC but by AMC's own

security. It can be excluded because the premises on which it occurred were not under IPC's control. *Wood,* 984 S.W.2d at 524. These incidents do not make the plaintiff's alleged rape foreseeable because they are not sufficiently similar to provide notice to the defendants that the subject crime was likely to occur.

A business owner is, in some cases, in a better position to predict future crime based on its knowledge of past crimes. But that logic fails when applied to this case. This case involves an alleged victim and offender who knew each other (the plaintiff telling others that Brandon Fitzpatrick was her boyfriend) and who arranged to meet at the mall on the night in question. Once they made their rendezvous at the mall, they engaged in admittedly consensual acts of affection before the incident occurred.

It is well-established that crimes between victims and offenders who are acquaintances are virtually unpredictable. As a matter of criminology, prior similar crimes at a given property do not predict future crimes between victims and offenders that know each other. *See* Lawrence W. Sherman, *Violent Stranger Crime in a Large Hotel: A Case Study in Risk Assessment Methods,* 1 Security Journal 40, 40-41 (1989). "In a crime where the victim and the offender are acquainted, . . . its occurrence may be predictable from their relationship. It is not usually predictable as to place of occurrence, however, especially in public places. *There is apparently no reasonable way for the operator of a business to foresee*

*that previously acquainted persons will enter the premises and commit violent acts against each other*." *Id*. at 40-41 (emphasis added).

Compare this case to other premises liability cases that have employed the prior violent crimes exception. The relevant crime history at the mall pales in comparison to those cases. In *Brown v. National Super Markets, Inc.*, *supra*, Brown sued National Super Markets, its security service and a security guard for injuries that Brown sustained when she was assaulted by an unknown assailant in the supermarket parking lot. Brown established a crime history at the supermarket which included ***159*** similar and recent crimes giving rise to the supermarket's duty to protect the plaintiff. *Brown,* 731 S.W.2d at 309-10.

In *Madden v. C & K Barbecue Carry Out, Inc.,* 758 S.W.2d 59 (Mo. banc 1988), this Court actually considered two cases. The first of these was the Decker case, in which there were fourteen crimes outside a Schnuck's market in the three years prior to the victim's abduction and murder. The property's crime history included four armed robberies, an attempted armed robbery, an assault with a deadly weapon, and flourishing a deadly weapon over a short time period. All of these crimes involved serious bodily injury. *See id.* at 60-61. In the underlying Madden case, there were fourteen recent and similar crimes in the three years preceding the plaintiff's abduction and rape. The restaurant's crime history included six armed robberies and six strong arm robberies in only thirty-six

months. *Id.* at 60. All of the crimes in this case also involved serious bodily injury.

The plaintiff alleges nowhere near the number of incidents that established a duty in *Brown*. Nor are the prior incidents alleged by the plaintiff the same type that supported a duty in the two cases comprising *Madden*; in this case there is no pattern of crimes involving serious bodily injury.

Furthermore, *Madden* and *Brown* both involved properties that were much smaller than this mall, which is one of Kansas City's largest shopping centers. This last point is important because the number of crimes needed to reasonably predict potential risk naturally increases with population. The fourteen prior crimes that triggered the landowners' duties in *Madden* were significant because of the relatively small size of the businesses. C & K Carry Out was a small barbecue restaurant, and the *Madden* plaintiffs were in the parking lot of only two adjoining stores. Given the comparatively few people that patronized the businesses being scrutinized in *Madden*, fourteen prior similar crimes was significant when it came to accurately forecasting risk. The same or nearly the same number of crimes becomes statistically insignificant where the property – in this case the mall – is visited by hundreds of thousands of people each year. Were that not so, any sizable commercial enterprise would become a virtual insurer or guarantor of its

customers' safety merely because the land it occupies is larger and the number of invitees is greater.

Looking outside of Missouri, courts have refused to extend liability to a land occupier under similar circumstances. In *Milles v. Flor-line Assoc.*, 442 So.2d 584 (La. App. 1983), a shopper brought an action against a shopping mall tenant and security service for injuries sustained during a purse-snatching in the shopping mall's parking lot. Given evidence that security guards patrolled the parking lot with two guards on duty the night of the attack and the fact that there had been only six purse-snatchings within a four-year period preceding the subject incident, there was insufficient criminal activity to find the defendants liable. Therefore, the court concluded that the trial court properly held the mall tenant did not breach its duty to exercise reasonable care to safeguard mall patrons.

In *Taylor v. Hocker*, 428 N.E.2d 662 (Ill. App. Ct. 1981), the court affirmed summary judgment in favor of the shopping mall owners in an action for negligence brought by customers who were assaulted and stabbed in the mall's parking lot by a third-person. The court held that, assuming the owners had a duty to maintain adequate lighting to deter crime in the parking lot, the claimed lighting inadequacy did not appear to be either the cause in fact of the criminal attack or the proximate cause of the customers' injuries.

The plaintiff will surely argue that IPC's argument is callous, or that such a rule insulates larger businesses from liability. Not so. The issue here is duty, and foreseeability is an indispensable component of duty. The greater the population the greater the number of like crimes needed to make any particular crime in a particular category foreseeable. Indeed, that is one reason the FBI and police departments everywhere discuss and track crimes by population (typically expressed in terms of number of crimes per 1,000 people).

This case is much more akin to *Wood v. Centermark Properties, Inc.*, discussed extensively above, and *Knop v. Bi-State Development Agency*, 988 S.W.2d 586 (Mo. App. 1999). In *Knop*, the plaintiffs sued Bi-State Development Agency for their mother's wrongful death when she was murdered in a parking garage operated by Bi-State. The *Knop* court was presented with two *identical* crimes over a twenty-four month period when it analyzed whether the prior violent crimes exception applied. The plaintiffs additionally alleged that several robberies and strong arm robberies had taken place in the parking garage which gave the owners notice of the subject crime. The *Knop* court (as did the court in *Wood*) correctly sifted through the alleged crime history and ultimately held that the relevant crime history was legally insufficient to invoke the prior violent crimes exception. *Knop*, 988 S.W.2d at 591-92.

The better-reasoned cases for the Court to follow here are those that follow the general non-liability rule. The *Wood* and *Knop* courts sifted through the irrelevant crime history compiled by those plaintiffs and correctly analyzed whether the *relevant* crime history would have put the business owners on notice that the subject crime was likely to occur. Those courts also considered the grave policy concerns involved before requiring landowners to protect against unforeseeable crimes. This Court is presented with those same issues here and there is no logical distinction to be made to justify a holding different from those in *Wood* or *Knop*.

**F. The court of appeals erred in its analysis.**

This Court properly granted transfer because the opinion of the court of appeals failed to apply the settled law of this state to the facts. The court of appeals failed to apply the correct summary judgment principles in its *de novo* review of the trial court's decision. It also ignored relevant material facts presented by the defendants and misapplied existing law to those facts. IPC respectfully asks this Court to correct these errors in its review.

The rules governing summary judgment and the corresponding appellate review are well-established and do not bear repeating here. IPC does not take issue with the court of appeals' de novo standard of review or its general recitation of the

law governing summary judgment, but the court of appeals misconstrued or improperly applied summary judgment principles in its opinion.

Throughout the opinion, the court framed the issue as whether "a trier of fact" could find that IPC had a duty to protect the appellant from her alleged attacker. *See, e.g.*, Opinion at 11. Duty, however, is purely question of law for the court to decide – it is not for the trier of fact. *Wood v. Centermark Props., Inc.*, 984 S.W.2d 517, 523 (Mo. App. 1998). *See Opinion* at 11, 19, 22, 25, 35.

Once a summary judgment movant establishes its right to judgment as a matter of law, as the respondents did here, the burden then shifts to the non-movant to show that the moving party is not entitled to summary judgment. In reaching its decision, the court of appeals extensively analyzed and referenced a crime table generated from IPC incident reports and Kansas City Police Department records. *See* Opinion at 15-16. The court of appeals should not have considered those documents because they are or contain inadmissible hearsay. A non-moving party must set forth disputed facts by way of "affidavit, deposition, answer to interrogatories, or admissions on file" as required by Rule 74.04(e). Only evidence that is "admissible or usable at trial can sustain or avoid summary judgment." *Partney v. Reed*, 889 S.W.2d 896, 901 (Mo. App. 1994). Supporting documents must be authenticated. *See id*. A party may not avoid summary judgment by relying on hearsay. *Yow v. Village of Eolia*, 859 S.W.2d 920, 922 (Mo. App.

1993); *Jones v. Landmark Leasing Ltd.*, 957 S.W.2d 369, 376 (Mo. App. 1997). The reports offered by the plaintiff and relied upon by the court of appeals were never authenticated, and they pose compound hearsay problems. The trial court could not have considered these documents under *Partney*, *Yow*, and *Jones*, and presumably (and properly) did not, yet the court of appeals accepted this inadmissible evidence as though it were reliable.

Further, the opinion makes only passing reference to *Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517 (Mo. App. 1998), a case decided only three years ago on functionally identical facts and which, for all intents and purposes, is indistinguishable from this case. The courts in *Wood* and closely analogous cases such as *Hudson v. Riverport Performance Arts Centre*, 37 S.W.3d 261 (Mo. App. 2000), and *Knop v. Bi-State Development Agency*, 988 S.W.2d 586 (Mo. App. 1999), found that no duty existed to protect a patron from a third-party criminal act. The court of appeals essentially ignored these cases in its analysis.

To determine the relevant crime history, the court of appeals incorrectly concluded that crimes outside the mall should be excluded from consideration. Opinion at 17-19. The court of appeals then decided that seventeen indoor crimes should be considered and were legally sufficient to make the subject crime foreseeable. Opinion at 21. But the relevant crimes, if any, to be analyzed by the Court of Appeals should have been the *outdoor* rather than the indoor incidents at

the shopping center. It is undisputed that, if a rape occurred, it happened outside. The plaintiff has argued from the outset that the rape is the proper crime to consider when analyzing the mall's crime history. No one ever has argued that the assailant taking the appellant outside should be the benchmark from which to analyze the crime history. Based on the correct analysis of outdoor crimes, at most only sixteen of the thirty-seven incidents raised by the plaintiff were arguably eligible crimes.

The plaintiff has no claim against IPC under any recognized legal theory. "In Judge Cardozo's shorthand 'proof of negligence in the air, so to speak, will not do'." *Lough v. Rolla Women's Clinic*, 866 S.W.2d 851, 853 (Mo. 1993). Absent some existing duty, there was and is nothing for IPC to assume. *See*, *e.g.*, *Horstmyer*, 151 F.3d at 774; *Davidson*, 70 F. Supp. 2d at 1027. Because the mall's owner and management company owed the plaintiff no duty, there is and was no duty for IPC to assume. Because IPC owed no duty to the plaintiff either through an express assumption or through some alleged breach of contract, IPC cannot assume a duty to her at all.

**G. The plaintiff made no showing of negligence or causation.**

IPC admits the plaintiff's status as an invitee, but it does not concede that any defendant owed her a duty or that sufficient facts exist to prevail on any other element of her claim. Here, as below, the plaintiff devotes most of her argument to

the issue of breach. But because no general duty exists to protect an invitee from a deliberate criminal act by a third person, the remaining elements of breach, causation and damages need not be considered here and were correctly ignored by the trial court.

The plaintiff submits that it is "undisputed" that she presented sufficient evidence on the issue of breach, causation, and damages. Appellant's Substitute Brief at 81. This is not correct. Those elements have not been addressed, and rightfully so, because the issue involved in the appeal is the respondents' duty to protect her from her alleged attacker. Even if such elements are considered, however, IPC did not breach any alleged duty to protect the plaintiff.

As discussed above, IPC employs officers stationed in mobile units as well as on rooftops and throughout the shopping center. There are no facts to suggest that any of the plaintiff's suggested security measures would have prevented her attack, nor is there any evidence to suggest that the alleged lack of security measures allowed the attack to occur. There is nothing to suggest that any act of IPC was either the cause in fact or the proximate cause of her attack. To the contrary, one person is responsible for her attack – Brandon Fitzpatrick. To argue that any of the respondents caused her attack is simply disingenuous.

The plaintiff spends a significant amount of her brief arguing that this rape could have been easily prevented. She argues that locks on doors, roof-top guards

fortuitously located, and extra lighting would have prevented this crime. But no existing security system, no matter how elaborate, could stop a determined criminal. Tipton, *Business In Security; "Negligent Security" Suits Rise,* St. Louis Post Dispatch, October 17, 1988 at 35bp. The record shows that IPC utilized roof-top security officers and had officers on mobile patrol in vehicles in the parking lots. It employed off-duty police officers and former Marines. Frequent and random security checks were made throughout the shopping center's premises. The undisputed facts show that IPC's conduct went beyond a reasonable effort to fulfill its contract.

Crime is a prevalent but unfortunate fact in everyone's life, especially when the crimes are perpetrated between a victim and an offender who are known to each other, as was the case here. In such cases, crimes become even more unpredictable than usual, from the land occupier's perspective, because they have no rhyme or reason in terms of location or time. They are simply based upon the victim's and the offender's relationship.

The plaintiff asks how easily this crime could have been prevented by the defendants. The more appropriate question is how easily could it have been prevented by Fitzpatrick, or even by the plaintiff. The two predetermined that they would meet at the mall on March 15, 1997. They certainly had more knowledge about their engagement than did any of the respondents here. The plaintiff

consensually engaged in acts of affection with Fitzpatrick when she obviously had the opportunity and ability to act in a different manner. Again, she had more knowledge about Fitzpatrick than any of the defendants. To argue that IPC or any other defendant is responsible for her alleged injuries misses the point and improperly places responsibility on the public rather than where it rightly belongs – on the offender.

## CONCLUSION

Crime is an unfortunate reality in today's society. But crime is at base the responsibility of criminals, a point that Missouri courts readily acknowledge. *See, e.g., Warren v. Lombardo's Enters., Inc.,* 706 S.W.2d 286, 288 (Mo. App. 1986). Exceptions to the general no-liability rule "are simply methods to place liability for the results of such irresponsibility upon one who bears no responsibility for the illegal conduct itself." *Id*. at 288. There was no duty on IPC's part to protect the plaintiff from her alleged attack. The trial court correctly recognized and applied Missouri law when it entered judgment in favor of IPC. That judgment should be affirmed.

Respectfully submitted,

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## RULE 84.06 CERTIFICATE

1. a. The undersigned certifies pursuant to Rule 55.03(a) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri bar number, and telephone number are as follows:

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The undersigned certifies that this brief is not verified or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in this brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief does not seek sanctions.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 13,291 words and 1,206 lines of text.

4. Pursuant to Rule 84.06(g), the undersigned certifies that the disks containing this brief that are filed with the Court and served on the parties have been scanned for viruses and that they are virus-free.

_____

Jeffery T. McPherson

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief and a disk containing the brief were mailed, first-class postage prepaid, on October 22, 2001, to:

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